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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered in the above-entitled case on January 11, 1963. That court addressed itself more specifically to the issues here presented in an opinion on petitioner's motion for rehearing entered on July 12, 1963.

OPINIONS BELOW

The opinion of the Court of Claims entered on January 11, 1963, is printed in Appendix A hereto, *infra*, p. 2a, and is reported in 312 F. 2d 418. The opinion on the motion for rehearing and reargument entered on July 12, 1963, is also printed in Appendix A hereto, *infra*, p. 69a, but is unreported (No. 56-59, Ct. Cl.).

JURISDICTION

The final judgment of the Court of Claims was entered on July 12, 1963, when it rendered its opinion denying petitioner's timely motion for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1255 (1958).

QUESTIONS PRESENTED

Petitioner seeks, on its own behalf and on behalf of its specified subcontractors, as damages the profits which it and its subcontractors would have realized had the performance of its Capehart housing contract not been prevented by respondent's unjustified termination of the contract. The contract contained no article allowing termination for the convenience of the Government. It did contain, however, all the articles set forth in the housing contract form approved by the Assistant Secretary of Defense (Properties and Installations) and the Federal Housing Commissioner as required under the Capehart Act. Section 8.703 of the Armed Services Procurement Regulations (hereinafter referred to as "ASPR") in effect on the date of the execution of this Capehart housing contract, provided that a specified Termination for the Convenience of the Government article shall be inserted in certain fixed-price military department construction contracts. No similar termination article was prescribed for use in military construction subcontracts or for use in Capehart contracts.

The Court of Claims held that section 8.703 of ASPR required, as a matter of law, the inclusion in petitioner's Capehart housing contract of the military article providing for the termination of construction contracts for the convenience of the Government and for that

reason neither the petitioner or its subcontractors were entitled to recover their anticipatory profits as part of their damages for the wilful breach of contract by the Government.

The questions presented are as follows:

1. Whether a contract form drafted and approved pursuant to the Capehart Housing Act and adopted by the parties as their contract is the sole source of their mutual rights and obligations under that contract, or whether the contract must include, as a matter of law, a provision set forth in a regulation (section 8.703 of ASPR) promulgated for the internal management of the military departments even though the provision was deliberately omitted from the contract form by the parties?

2. Whether section 8.703 of ASPR has the force and effect of law and, if it does, whether ASPR and section 8.703 thereof are applicable to contracts which are—by the express language of ASPR excluded from the operation of ASPR?

3. Whether a procurement regulation that only pertains to prime contracts has any legal effect on subcontracts?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth to the extent indicated below in Appendix B, *infra*. Among them is the Capehart Act which is the popular name for Title IV of the Housing Amendments of 1955, ch. 783, 69 Stat. 646-54, 84th Cong., 1st Sess., as amended by Title V of the Housing Act of 1956, ch. 1029, 70 Stat. 1109-12, 84th Cong., 2d Sess., now found in slightly changed and codified form in 12 U.S.C. secs. 1748-1748g, 1720f (1958) and 42 U.S.C. secs. 1594-1594f

(1958). It is not deemed necessary to set forth the entire Act, but it is discussed and explained herein starting on p. 22, *infra*. One pertinent section is set forth in Appendix B, *infra*.

The pertinent provisions of Section VIII of ASPR are also set forth in Appendix B. This section of these Regulations in effect at the time of the execution of this contract, was issued under the authority of 5 U.S.C. sec. 22, which is set out in Appendix B. Section VIII was also issued to interpret or apply the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21, 80th Cong., 2d Sess. This Act, discussed by the Court of Claims, is found, as slightly changed and codified in 10 U.S.C. secs. 2301-14 (1958). This Act as codified is set forth in its entirety in Appendix B.

STATEMENT

The facts as stated in the Findings of Fact and as found by Commissioner Mastin G. White of the Court of Claims, Appendix A, *infra*, p. 20a, are not contested by petitioner.

Petitioner was the prime contractor on a Capehart Act housing project contemplating the construction of 2,000 dwelling units for the long-range needs of military personnel at Fort Polk, Louisiana. The contract consisted of the terms and provisions previously approved by the Federal Housing Commissioner and by the Assistant Secretary of Defense (Properties and Installations). On the first page of the contract under "STATUTORY AUTHORITY" it is specifically stated that the contract is authorized by the statutory provisions that are commonly referred to as the Capehart Act. No other statutory authority was referenced.

In 1958 respondent unilaterally cancelled the contract. Since private funds had to be used to finance the construction of a Capehart housing project and since the military department was required by statute to certify to congressional committees a long-term need for the military housing, no need was felt to include a Termination for Convenience of the Government article in the standard Capehart housing contract form. Consequently, the Capehart housing contract involved in this litigation does not contain any provision for suspension or termination of the work for the convenience of the Government. Respondent does not dispute this fact; actually respondent attempted on numerous occasions to obtain an agreement with petitioner to modify the contract by incorporating therein the termination procedures specified in Section VIII of ASPR. Petitioner rejected all such attempts. The parties, however, did settle by negotiations most of the outstanding items of damages resulting from respondent's unilateral cancellation of the contract. A few relatively small items of cost and the item of anticipated profits for petitioner and certain subcontractors could not be settled by negotiations.

Petitioner filed a timely petition in the Court of Claims under its jurisdiction as set forth in 28 U.S.C. sec. 1491 on behalf of itself and certain of its subcontractors to obtain payment of anticipatory profits and certain costs. The Commissioner found and recommended in his Report that petitioner and its specified subcontractors be awarded anticipatory profits and certain items of cost. After receiving the Commissioner's Report and hearing oral argument on December 5, 1962, the Court of Claims issued on January 11, 1963 a tripartite opinion together with findings of fact and con-

clusions of law which are set forth in Appendix A, *infra*, pp. 2a-68a. In the second part of the opinion (Appendix A, *infra*, pp. 10a-19a) the court refused to allow recovery for the anticipated profits of petitioner or of any of the subcontractors which normally would be allowable at common law for breach of contract. The court concluded that the Termination for Convenience of the Government article set forth in section 8.703 of ASPR was incorporated as a matter of law into petitioner's Capehart housing contract. Petitioner does not contest the first or third parts of the opinion nor the basic findings of fact.

Believing that the doctrine enunciated in the second part of the opinion was not only erroneous and novel, but was also a dangerous precedent, petitioner moved on the basis of a supporting brief for rehearing and reargument. The novelty of the court's position is evidenced by its own admission in the second opinion that none of the parties applied the convenience termination article in their administrative settlements and that the case was not tried on that principle. (Appendix A, *infra*, p. 69a.) On July 12, 1963, the Court of Claims rendered a detailed opinion rejecting petitioner's motion and holding again that section 8.703 of ASPR had the force and effect of law and hence must be read into this Capehart housing contract, regardless of the intent of the parties or the wording of the contract. This was the court's conclusion despite the fact that the Armed Services Procurement Regulations apply only to contracts (1) involving appropriated funds and (2) entered into under the authority of the Armed Services Procurement Act of 1947. The Capehart housing contract in question neither involved appropriated funds nor was it entered into under the Armed Services Procurement Act of 1947.

The novel decision below is not only erroneous but is so far reaching in its impact that this Court should review and reverse for the following reasons: (1) The decision below conflicts with landmark decisions of this and other courts; (2) it has already caused damaging confusion and uncertainty in the federal government's multi-billion dollar military procurement program; (3) it determines that other statutes which authorize contracts are subservient to the Armed Services Procurement Act regardless of subject matter; (4) it holds that Section VIII has the force and effect of law when there is no statutory grant; (5) it conflicts with decisions of this and other courts in applying ASPR to Capehart Act housing contracts; and, finally, (6) it holds that the provisions required by section 8.703 of ASPR must be included retroactively in contracts with subcontractors who were not in privity with the Government.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Landmark Decisions of This Court in the Field of Government Contracts

This Court has always recognized that damages for breach of contract by the Government include the loss of anticipatory profits. The rule was firmly established in one of the oldest decisions applicable to Government procurement in *United States* v. *Speed*, 75 U.S. 77 (1868). That rule has been followed by this Court and other courts without exception until the Court of Claims rendered the decision below. The factual and legal situation in the *Speed* case is very similar to that in the case below. Speed contracted with the Government on October 27, 1864 (in wartime) to slaughter and pack 50,000 Government-furnished hogs. The Government delivered 16,107 hogs but owing to the very high price of hogs the Contracting Officer with the

approval of the Commissary-General gave up the enterprise and refused to furnish to Speed the remainder of the 50,000 hogs. The contract did not contain a provision that it could be terminated at such times as the Commissary-General should direct. The absence of such a provision is significant because Rule No. 1179 of the Army Regulations prescribed by the Secretary of War and effective at the time of the execution of the Speed contract provided:

> *These agreements* [contracts for subsistence stores] *shall expressly provide for their termination at such time as the Commissary-General may direct.* [Emphasis added.]

75 U.S. at 77. This Army regulation was issued under the authority of ch. 40, § 7, 3 Stat. 427 (1818) which specifically provided that contracts for Army supplies shall be made under regulations prescribed by the Secretary of War; unlike the regulation herein involved, it obviously had the force and effect of law. Among the arguments made by the Government against possible liability for common-law damages was the following:

> 3. If the want in this contract of the provision for its termination at such time as the Commissary-General shall direct, does not vitiate the contract, it must be held that the contract will be treated as *containing* the *clause*, inasmuch as the law requires that it should contain the clause.

Id. at 80.

That contention is very similar to the Court of Claims' holding in the case below. However, in the *Speed* case this Court rejected that argument and granted Speed recovery of the anticipatory profits that he would have earned had the Government not improperly terminated his contract. It is important to note

that this Court in so holding gave a very narrow meaning to "subsistence stores" in order to avoid the application of the statutory regulation. It then said the Government could have insisted on the contract provision required by the Regulation but since it did not do so, it could not have the benefit of it as thought it had.

The *Speed* decision, arising out of a wartime contract is the cornerstone for the rule and policy followed in this country for over a century of allowing anticipatory profits as part of the damages the Government must pay for unjustified termination of a contract unless limited by a contract provision or statute. The Government procuring agencies have always recognized this and so advise in their official publications. See Appendix C, *infra*, pp. 104a-105a. The court's holding in the decision below is the first decision contrary to that century-old rule and policy.

The unbroken chain of precedents that followed the doctrine of the *Speed* case include such other landmark decisions as: *United States* v. *Behan*, 110 U.S. 338 (1884); *United States* v. *Spearin*, 248 U.S. 132 (1918); *S. Harvey Klein, Assignee* v. *United States*, Ct. Cl. Docket No. 20-56, 285 F. 2d 778 (1961).

It is most important that this Court reaffirm the *Speed* rule by review and reversal of the decision below.

2. The Decision Below Has Caused Damaging Confusion, Uncertainty and Instability in the Federal Government's Multi-Billion Dollar and All-Pervasive Military Procurement Program

The federal government's annual military procurement program exceeds fifty billion dollars. As a result of the unprecedented decision below, the entire military procurement program is seriously endangered because

no longer can any one define the rights of the parties under military procurement contracts.

Since the founding of this country, the military departments have contracted on the basis of the mutual agreement of the parties; that will no longer be true unless the decision below is reversed. What the decision below says to the world of Government contractors is simply: The contract form which the Government draws up in the first instance pursuant to a statute to meet its needs and which both parties sign does not represent the agreement of the parties and the extent of their liabilities and obligations.

If petitioner could not rely with certainty as to what its contractual rights and obligations were under its Capehart housing contract, what could it have done to obtain certainty? It would not have been enough if the Secretary of Defense had personally signed the contract since the approval of his *alter ego*, the Assistant Secretary of Defense (Properties and Installations) as well as the Federal Housing Commissioner was evidently not adequate.

The original amount of the contract was approximately thirty-three million dollars. Rights and obligations under such a sizeable contract cannot be assumed lightly or under doubt. If petitioner had consulted any of the chief legal officials of any of the military departments, it would have been advised that it was enfitled to common-law damages in the event its Capehart housing contract was unilaterally cancelled by the Government. The military departments, as well as the General Services Administration, have for years published such advice; extracts taken from their publications are set forth in Appendix C, *infra*, pp. 104a-105a).

The decision below has the effect of converting procurement via agreement by the parties to procurement by regulation. Instead of being governed by a contract, the parties will be bound by a "rule-book." A contractor, however, will not have a voice in the drafting of the rules; he will in fact have extreme difficulty in ascertaining what is in the "rule-book." Not only does ASPR cover hundreds of pages, but under section 1.108 of ASPR, the military departments and procuring activities therein are authorized to issue their own implementing regulations to the ASPR. The issuance of none of these regulations is subject to the rulemaking safeguards of the Administrative Procedure Act (5 U.S.C. sec. 4) and very few of them are published in the Federal Register. Hence, most government contractors do not have access to them. The adverse effect of this on federal Government contractors and Government officials is widely recognized. The *Government Contractor*, published by Federal Publications, Inc., (5 GOVT. CONT. ¶ 57 (1963)) made the following comment:

> Moreover, from a practical standpoint the burden which the instant decision imposes on contractors might well prove to be intolerable. If carried to its possible extreme, for example, the decision could require a prospective contractor to search not only the entire ASPR, but the implementing regs of the particular military service with which he is contracting (AFPI, APP or NPD), in order to determine exactly what his contractual obligation may be—even though the *contract itself* contains *no references* to any portions of these regs. Such a task might involve "hairline" determinations by contractor as to whether particular provisions of the regs are—or are not—applicable to his contract. Illustrative of this is the instant case

> itself, wherein it was certainly not free from doubt that ASPR applied to Capehart contracts . . . .

Confusion and uncertainty is not only the lot of contractors; Government representatives also share in it. The Court of Claims has said that clauses prescribed by ASPR are automatically included; no longer does the appropriate Government official have the discretion to omit a clause if it is not in the best interests of the Government to have it included. The decision of the court below can obviously be used against the Government when the omitted clause is favorable to the contractor. *E.g., School District 2 Fractional* v. *United States*, 229 F. 2d 681 (6th Cir. 1956).

The distaste of the Government for the rule announced in the decision below is shown by the fact that responsible government agencies have failed to follow it. *Homer Electric Assn., Inc.*, ASBCA No. 7649, 1962 BCA ¶ 3608; *Aero Corp.*, ASBCA No. 8178, 1963 BCA ¶ 3665; Comp. Gen. B-151787, Sept. 3, 1963. The confusion resulting from the failure of the Comptroller General to apply the rule of the decision below in the above latter case (B-151787) was discussed in the *Government Contractor* (5 GOVT. CONT. ¶ 442) where the inability to reconcile the two decisions was noted. If the Termination clause was included into the contract by the court below because (a) section 8.703 of ASPR requires its inclusion and (b) that section has the force and effect of law, then the editor asked, why did not the Comptroller General read certain prescribed clauses into the bid invitations. Especially decried was "the broad sweep which the *Christian* decision gives to the 'force of law' concept." In conclusion the editor said:

> Things seem to be getting very confusing for contractors. Simply determining which clauses a

> contract contains—a matter which used to be ascertainable by the straightforward method of reading the words of the contract itself—has now become a major project based partly on guesswork. The mere statement of this Alice-in-Wonderland situation, without further elaboration, would seem to be sufficient to indicate that reforms are needed.

The editors of the *Government Contracts Reporter*, published by Commerce Clearing House, Inc., have also questioned the results of the decision below, and stressed the need for further court clarification. This Commerce Clearing House comment is set forth in full in Appendix C, *infra*, pp. 105a-107a.

Further confirmation of the fears and dangers of the impact of the decision below is shown by the excerpts taken from the very thorough commentary on it published in the Georgetown Law Journal (51 GEO. L.J. 842 (1963)) and set forth in Appendix C, *infra*, pp. 107a-109a.

The harmful impact of the decision below is especially grave to the small contractor who cannot afford the cost of a large legal department or the constant services of legal specialists in Government contracts. The small contractor can read and understand the regulations concerned with the technicalities of his trade or business and he can read his contract which used to inform him of his legal obligations. He cannot, however, afford the services of the large legal department now required to ascertain just what is included from the thousands of pages of regulations into his contract by operation of law. As a practical matter, the decision below places the small business man at the mercy of the Government.

It is most important that it be determined by this Court whether it is necessary that the federal govern-

ment's multi-billion dollar military procurement program be conducted on a "guesswork" and in an "Alice-in-Wonderland" atmosphere.

3. Determination Should Be Made of the Conflict Between the View of Petitioner and the Military Department Officials That the Capehart Act Takes Precedence Over the Armed Services Procurement Act and the View of the Court of Claims Expressed in the Opinion Below That the Armed Services Procurement Act Is an Over-all Procurement Statute Which Takes Precedence Over All Statutes That Even Affect Military Procurement

The Capehart Act specifically provides (42 U.S.C. sec. 1594), that the "Secretary of Defense *or his designee* is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing . . . ." [Emphasis added.] It also provides that any "such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States . . . ." Thus, authority was given to the Secretary of Defense to approve the content of the Capehart housing contract form. The Capehart Act does not state that the *terms* and *provisions* of such a contract must be consistent with or subject to the requirements of any other statute or regulation.

The Capehart housing contract involved in this litigation was awarded as the result of formal advertising and in all respects met the requirements of the Capehart Act. [The only limitation on the authority of the Secretary of Defense set forth in the Capehart Act was that he *advertise* properly in accordance with the mandates of the Armed Services Procurement Act.] Notwithstanding such statutory compliance, the decision below holds that the convenience termination article prescribed by section 8.703 of ASPR is incor-

porated as a matter of law into this Capehart housing contract.

This conclusion in the decision below is based upon the false premise that the Armed Services Procurement Act had an over-all broad procurement purpose overriding the provisions of the Capehart Act. The Court of Claims erroneously describes the former as "general legislation empowering, in broad terms, a government agency to procure and to make contracts normally . . . [covering] all phases of that process—from the solicitation of bids or proposals, to the making of the contract, through its administration and performance, to its completion or termination." (Appendix A, *infra*, p. 71a.) The Armed Services Procurement Act is not a general procurement statute; it is a specific and limited statute. It deals principally with the requirement that contracts be let by formal advertising and the exceptions when procurement by negotiation is permitted. There are also provisions concerned with the small business preference, ban on cost-plus-percentage-of-cost contracting, advance payments, delegation of responsibility in letting contracts, and the role of the Comptroller General. Two short excerpts from its legislative history (one from the Senate Report and the other from the House hearings) are included in Appendix C, *infra*, pp. 92a-100a. Both excerpts show unequivocally that the Act concerns the problem of when procurement must be made by formal advertising procedures and when by negotiation. Even a bare perusal of the Act, Appendix B, *infra*, pp. 88a-97a) conclusively shows this; the Act has nothing to do with the general terms and provisions of a contract.

The decision below means that the Secretary of Defense can no longer draft a contract form or negotiate

a favorable contract under any statutory authority if the provisions thereof conflict with any one of the thousands of procurement regulations which might in some sense be said to have the force and effect of law. The Court of Claims conclusion in the decision below is a radical break with the past and contrary to the whole development of Government contract law. Absent the clearest statutory language, such a result should not be defined as the intent of Congress and allowed to remain.

4. The Determination in the Opinion Below That Section 8.703 of ASPR Has the Force and Effect of Law, Is Erroneous and Contrary to a Well-Established Construction Given by the Administrative Officials Charged With Its Enforcement

Section VIII of ASPR, of which section 8.703 is a part, was not in fact issued pursuant to statutory authorization and does not have the force and effect of law. When the Capehart housing contract involved in this litigation was executed, Section VIII then in effect (17 Fed. Reg. 1791 (1952), as amended, 32 C.F.R. sections 8.100-717.7 (Rev. 1954, Supp. 1957)) stated that it was issued under the authority of 5 U.S.C. sec. 22. See statement of authority quoted in Appendix B, *infra*, p. 98a. Title 5 U.S.C., sec. 22, authorizes the head of each department to prescribe regulations for the internal governing of his department and the preservation of records. See Appendix B, *infra*, pp. 87a-88a. It was first enacted in 1789 to permit the new administrative offices to organize themselves. As the Committee on Government Operations of the House of Representatives stated, when it considered adding the last sentence to prevent the withholding of information:

> The law has been called an office "housekeeping" statute, enacted to help General Washington

get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents.

H.R. Rep. No. 1461, 85th Cong., 2d Sess., 1958 U.S. Code Cong. & Admin. News 3352. As this Court has said, it conveys administrative power only and not legislative. *United States* v. *George*, 228 U.S. 14, 20 (1913). It confers no authority to "make rules for the conduct of persons not connected with the Departments . . ." 17 *Ops. Atty. Gen.* 524, 525 (1883).

In addition to being issued under the authority of the above Act, Section VIII of ASPR states that it is interpreting or applying the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21, 80th Cong., 2d Sess., now found as slightly changed and codified in 10 U.S.C. secs. 2301-14 (1958). See again statement of authority quoted in Appendix B, *infra*, p. 98a. As was stated hereinbefore the Armed Services Procurement Act of 1947 is a specific and limited statute.

This, then, is the statutory framework in which the question is presented: Can the direction to contracting officers to place a Termination for the Convenience of the Government article in certain contracts which is contained in a regulation made within the above statutory framework, be said to have the force and effect of law?

Before a regulation can be said to have the force and effect of law, it must not only be issued under the authority of a statute but it must also be within the scope of the congressional grant of power of that statute. See, *e.g.*, *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944). Section VIII of ASPR is issued under the authority of the office housekeeping

statute (5 U.S.C. sec. 22) and interprets the Armed Services Procurement Act of 1947. Even if the fact that the regulations are issued pursuant to 5 U.S.C. sec. 22 does not limit the force to the internal workings of the agency,[1] the regulations must still be confined within the scope of or be "reasonably adapted to the enforcement of" the Armed Services Procurement Act of 1947. See *Maryland Cas. Co.* v. *United States*, 251 U.S. 342, 349 (1920).

Evidently, cognizant of that requirement, the military departments issued the first three sections of ASPR (first published as Parts 851-53 of 10 C.F.R. on June 9, 1948, 13 Fed. Reg. 3074) with a very illuminating foreword. This foreword, which contains a letter from the President to the Secretary of Defense, is set forth in its entirety in Appendix C, *infra*, pp. 100a-101a. It states that the purpose of the regulations which should be issued under the Armed Services Procurement Act of 1947 is to assure the placing of contracts with small business concerns and to specify the circumstances when the general policy of advertising for bids may be waived.

With apparent regard for the limitations imposed by the statutory framework, Sections I-III, inclusive, of ASPR are generally within the statutory grant of power and most of the provisions within them can be said to have the force and effect of law.[2] (The first

[1] The Armed Services Procurement Regulations were not then and are not now issued pursuant to 10 U.S.C. secs. 3012, 6011, and 8012 (1958).

[2] The decisions of this Court in Paul v. United States, 371 U.S. 245 (1963) and Public Util. Comm. v. United States, 355 U.S. 534 (1948) dealt with regulations found in Sections I and III of ASPR.

three sections concern the following matters: I—General Provisions, II—Procurement by Formal Advertising, and III—Procurement by Negotiation.)

However, Section VIII on Termination of Contracts is so unrelated to these statutes that no attempt was made to issue it for over three years. Meanwhile, the Department of Defense supported legislation in 1948 (S-2450, 80th Cong., 2d Sess. (1948); H.R. 6152, 80th Cong., 2d Sess. (1948)), to establish a statutory basis for the government's convenience termination of contracts. In all essential respects the two bills were an adaptation for permanent use of the Contract Settlement Act of 1944, 58 Stat. 649, 78th Cong., 2d Sess., which was no longer effective. (Report of Comptroller General, B-75551, May 14, 1948.) For various reasons, including an unfavorable report by the Comptroller General, neither bill was reported out of committee.

Finally, on February 29, 1952, after all efforts to obtain peacetime termination legislation had failed, the Department of Defense issued Section VIII without any comment or foreword. 17 Fed. Reg. 1791. As Professor Covington Hardee of Harvard Law School, consultant to the Office of the General Counsel, Department of the Air Force, has said Section VIII has no statutory basis:

> The Contract Settlement Act of 1944 applied only to military contracts related to the prosecution of World War II. There is no statute in effect today governing termination procedures. But the ASPR devotes a full and detailed section to setting forth a prescribed method of handling the termination problem. *Since this section has no statutory warrant, termination pursuant to it seems to depend on the insertion in each contract, either ini-*

tially or by amendment, of the termination article provided for in Section VIII. [Emphasis added.]

Hardee, *Termination of Military Contracts*, 32 TEX. L. REV. 172, 176 (1953).

Even more important, official publications of the three military departments have repeated this obvious point and have stated unequivocally that the provisions of Section VIII apply only where there is a convenience termination article in the contract. Contractors shared these views of the military departments and their view has been recorded in a formal document of the Chamber of Commerce. Pertinent excerpts of all these documents are set out in Appendix C, *infra*, pp. 101a-103a.

The Secretary of Defense also shared the above views. Section VIII (section 8.101 (32 C.F.R., Rev. 1954)) provided that contracts not containing a convenience termination article or containing a convenience termination article different from the standard article may be modified to include a standard article. As shown by sections 8.101 and 8.102, *Section VIII applied only to contracts containing the standard convenience termination articles.* By its own terms, the requirements of Section VIII do not apply to this contract. Both sections 8.101 and 8.102 have been included in Appendix B, *infra*, p. 98a.

Only the Court of Claims in the decision below has said that Section VIII has the force and effect of law to the extent that it is automatically a part of this Capehart housing contract or any military procurement contract. The Court of Claims, nevertheless, is the tribunal which has exclusive jurisdiction over all

contractual claims in excess of $10,000 against the United States.

This Court has firmly established the rule that the construction of a regulation by the administrative agency which issued it (see sections 8.101 and 8.102 of ASPR) must be given controlling weight unless clearly erroneous. *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1945). The Court of Claims has given this construction no weight.

It is necessary that this Court review and reverse the decision below in order to reinstate confidence in Government contractors that they can rely upon the military departments' construction of their own regulations. It is also necessary that this Court should take this opportunity to reaffirm the doctrine of *Addison* v. *Holly Hill Fruit Prods., Inc.*, *supra*, and other cases; and to caution administrative agencies and departments that in their zeal to govern by regulation, they are limited to the scope of the statutory grant of power.

5. Even If Section VIII of ASPR Has the Force and Effect of Law, Its Application to This Capehart Housing Contract Conflicts With the Decisions of This Court and Other Courts

The board application given to Section VIII in the decision below is manifestly erroneous and can only be corrected as a practical matter by this Court's reversal of the decision below. The effect of Section VIII is limited to contracts entered into under the Armed Services Procurement Act of 1947 and which obligate appropriated funds. Neither prerequisite was present in this case.

Section 8.100 (see Appendix B, *infra*, p. 97a) clearly provides that Section VIII only applies to "termina-

tion of contracts of any Department entered into under the Armed Services Procurement Act of 1947 . . . ." However, as pointed out hereinbefore, the Capehart housing contract involved in this litigation states that it is made under the authority of the Capehart Act and 42 U.S.C. sec. 1594 (1958) of that Act does provide its statutory basis.

As further proof of Section VIII's inapplicability, section 1.402 (applying to the entire ASPR) specifically states that such Regulations apply only to contracts which "obligate appropriated funds." See Appendix B, *infra*, p. 97a. In *Paul* v. *United States*, 371 U.S. 245, 247-48, 263 (1963), this Court sanctioned the application of ASPR and the consequent federal control only with respect to milk *purchased with appropriated funds*. The decision below now conflicts with that holding. This Capehart housing contract did not "obligate appropriated funds." The latter phrase connotes present obligation, liability or restriction and this Court has said that it requires the existence of an appropriation. *Sutton* v. *United States*, 256 U.S. 575 (1921).

Briefly, Capehart Act projects require the submission of bids by, and the letting of contracts to, "eligible builders." Such bidders agree to form a corporation which, after the award, leases the land from the Government, arranges for Federal Housing Administration guaranteed private mortgage loans, and lets the housing construction contract. Payments are made under the housing contract to the builder solely from the mortgage proceeds. Upon completion of the housing contract, the stock of the corporation is turned over to the military department which also assumes the mortgage and pays it off over a period of years from

quarters allowances appropriated for military personnel. See footnote 9 in the first opinion below, Appendix A, *infra*, p. 13a.

Obviously, then, the *construction* under the Capehart housing contract is carried on by the use of private capital. The Department of Defense very carefully distinguishes between Capehart Housing and Appropriated Fund Housing. Furthermore, the legislative history of the Capehart Act makes the distinction very clearly and shows that the *construction* of the housing was to be paid from mortgage proceeds and not from appropriated funds. See Appendix C, *infra*, p. 103a. The Court of Claims appeared satisfied that because the mortgages would be eventually paid from quarters allowances and that since appropriated funds were "importantly involved", ASPR would apply. See first opinion below, Appendix A, *infra*, p. 15a. Notwithstanding, this Capehart housing contract *did not* obligate appropriated funds and, therefore, such Regulations cannot apply.

The above ruling of the Court of Claims conflicts in principle with decisions of at least two circuit courts of appeals. The United States Courts of Appeals for the Eighth and Tenth Circuits have recently recognized in decisions (this Court has refused to grant writs of certiorari) that the construction of Capehart housing is financed by private funds and is significantly different from ordinary Government construction. In those cases it was held that the Miller Act (40 U.S.C. secs. 270a-e (1958)) did not apply to the construction of Capehart housing. *Continental Casualty Co.* v. *United States ex rel. Robertson Lumber Co.*, 305 F. 2d 794, 797-99 (8th Cir.), *cert. denied*, 371 U.S. 922 (1962); *United States ex rel. Miles Lumber Co.* v. *Hir-*

rison Grimshaw Constr. Co., 305 F. 2d 363 (10th Cir.), *cert. denied*, 374 U.S. 920 (1962). In both cases, the circuit courts emphasized Capehart housing is not conventional Government construction (nor a "public work") because of the absence of federal funds. The determining factor in finding inapplicability of the Miller Act (which applies to all public works) was the fact that the project was built by a private corporate entity with private capital.

Thus, the decision below in holding that Section VIII applies to this Capehart housing contract conflicts with decisions of this Court and at least two circuit courts of appeals. This Court should resolve such conflicts.

6. Until the Decision Below Was Rendered, the Courts Uniformly Have Held That a Subcontractor Was Entitled to Common-Law Damages Against the Prime for the Unlawful Termination of the Subcontract

In the decision below the Court of Claims very cursorily determined that profit should be allowed on the claims of subcontractors on the same basis as on petitioner's claim.

ASPR recognizes that a prime contractor may be required to pay common-law damages to a subcontractor for the termination of a subcontract (ASPR 8.518.8(a)). Furthermore, there is no requirement in ASPR that a particular convenience termination article be inserted in a subcontract. Section 8.706 of ASPR merely "suggests" a form of such article for use in military fixed-price subcontracts. That language is radically different from the directive language of section 8.703 with regard to the termination article to be inserted in certain prime contracts.

It has been uniformly held that there is no privity of contract between the Government and a subcon-

tractor and that the subcontractor must look entirely to the prime contractor for any compensation due to it with regard to the subcontract. *E.g., Nickel* v. *Pollia*, 179 F. 2d 160 (10th Cir. 1950).

The Court of Claims was asked by petitioner to determine what damages it was obligated to pay the subcontractors for the termination of their subcontracts so that it might recover those damages as part of its costs of termination against the Government. Clearly, ASPR does not apply to the legal relationship between the prime and the subcontractor in the absence of a specific statutory or contract provision to that effect. Furthermore, there is no provision in ASPR that justifies the decision below in this regard.

By depriving the subcontractors of their common-law damages against petitioner under the facts of this case, the decision below has completely changed the position of the subcontractor in the military procurement program from what it always has been. Not only is the prime contractor's contract with the Government no longer a solemn document, but a small subcontractor many tiers removed from privity with the Government is now denied any confidence in just what constitutes his contract. The decision below places the contractual obligations of subcontractors in complete chaos. Yet, subcontractors perform by far the greater part of this country's annual fifty billion dollar military program.

Here, again, the decision below has created confusion, uncertainty, and instability in the critical military procurement program by holding contrary to all precedents with regard to the legal position of subcontractors who have such a vital role in our defense program. The situation can only be remedied by this Court granting certiorari in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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